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Nos. 05-5224 and 05-5705

In the Supreme Court of the United States

HERSHEL HAMMON, PETITIONER,

v.

STATE OF INDIANA, RESPONDENT.

ADRIAN MARTELL DAVIS, PETITIONER,

v.

STATE OF WASHINGTON, RESPONDENT.

On Writs of Certiorari to the Indiana Supreme Court and the Supreme Court of Washington

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEBRASKA, NEVADA, NEW MEXICO, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an oral accusatory statement made to an investigating officer at the scene of a crime, or a victim's statement to a 911 operator naming her assailant, are governed by *Crawford v. Washington*, 541 U.S. 36 (2004), where the statements qualify as excited utterances under state law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT . 1

ARGUMENT 4

A. Excited Utterances Of The Kind Admissible At Common Law Are Not Governed By *Crawford* 5

B. Excited Utterances, As Understood In The Modern Era, Are *Per Se* Nontestimonial And Thus Not Governed By *Crawford* 17

CONCLUSION 22

TABLE OF AUTHORITIES

Cases: **Page**

Alden v. Maine, 527 U.S. 706 (1999) 17

Apprendi v. New Jersey, 530 U.S. 466 (2000) 5, 17

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) ... 5, 17

Aveson v. Kinnaird, 6 East 188, 102 Eng. Rep. 1258 (1805) 6, 7, 8, 9, 10

Berkeley Peerage Case, 4 Camp. 401, 171 Eng. Rep. 128 (1811) 7

Chambers v. Mississippi, 410 U.S. 284 (1973) 17

Commonwealth v. Gonsalves, 445 Mass. 1, 833 N.E.2d 549 (2005) 21

Commonwealth v. Hackett, 84 Mass. (2 Allen) 136 (1861) 9

Commonwealth v. M'Pike, 57 Mass. (3 Cush.) 181 (1849) 8, 9, 10, 11

Crawford v. Washington, 541 U.S. 36 (2004) ..... *passim*

Crookham v. State, 5 W.Va. 510, 1871 WL 2786 (1871) 16

Croomes v. State, 40 Tex. Crim. 672, 51 S.W. 924 (1899) 16

Rex v. Radbourne, 1 Leach 457 (1787) 11, 14

Rex v. Wink, 6 Car. & P. 397, 172 Eng. Rep. 1293 (1834) 16

Robertson v. Baldwin, 165 U.S. 275 (1897) 5

State v. Hill, 20 S.C.L. 607, 1835 WL 1416 (App. L. 1835) 15

State v. Horan, 32 Minn. 394, 20 N.W. 905 (1884) 16

State v. Middleham, 17 N.W. 446 (Iowa 1883) 16

State v. Miller, 1 Del. Case 512 (1814) 12

State v. Morea, 2 Ala. 275, 1841 WL 201 (1841) 12

State v. Morrison, 64 Kan. 669, 68 P. 48 (1902) 16

State v. Murphy, 16 R.I. 528, 17 A. 998 (1889) 16

State v. Ohlson, 125 P.3d 990 (Wash. App. 2005) 21

State v. Wagner, 61 Me. 178, 1873 WL 3285 (1873) 16

State v. Whittier, 21 Me. 341, 1842 WL 1198 (1842) 12

Tennessee v. Garner, 471 U.S. 1 (1985) 5

Thompson v. Trevanion, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694) ..... *passim*

United States v. Arnold, 410 F.3d 895 (6th Cir.), vacated and superseded on other grounds, ___ F.3d ___ (6th Cir. 2005) 3, 4, 19, 20

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 17

Utah v. Evans, 536 U.S. 452 (2002) 17

White v. Illinois, 502 U.S. 346 (1992) 3, 6, 14, 16

Wilson v. Arkansas, 514 U.S. 927 (1995) 5

Constitutional Provisions:

U.S. const. amend. IV 5

U.S. const. amend. VI ..... *passim*

Rule:

Fed. R. Evid. 803(2) 16

Miscellaneous:

Comment, *Li'l People, Little Justice: The Effect of the Witness Competency Standard in California on Children in Sexual Abuse Cases*, 22 J. Juv. L. 113 (2001-2002) 12

Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 Brook. L. Rev. 105 (2005) 13, 14, 15

Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171 (2002) 7

W.S. Holdsworth, *A History of the English Law* (1924) 10

McCormick on Evidence (5th ed. 1999) 17, 18, 19

John E. B. Myers, *Evidence in Child Abuse and Neglect Cases* (1992) 12

S.M. Phillipps, *A Treatise on the Law of Evidence* (1st Am. ed. 1816) 7, 10, 11, 13

The Proceedings of the Old Bailey, London 1674 to 1834, Henrietta Radbourne, t17870711-1 (July 11, 1787), <http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html> 14, 15

Thomas Starkie, *A Practical Treatise on the Law of Evidence* (1st ed. 1824) 7, 10, 13

Eustachius Strickland, *A Treatise on Evidence* (1830) 7

Jone Tran, *Crying Wolf or an Excited Utterance? Allowing Reexcited Statements to Qualify Under the Excited Utterance Exception*, 52 Clev. St. L. Rev. 527 (2004-05) 18

1 N. Webster, *An American Dictionary of the English Language* (1828) 4

John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1904) . 6, 18, 20

Wigmore, *Evidence* (Chadbourn rev. 1976) 19

INTEREST OF THE *AMICI CURIAE*

These cases ask whether two out-of-court statements — an oral accusation made to a police officer at the scene of a crime, and a victim's statement to a 911 operator naming her assailant — are governed by *Crawford v. Washington*, 541 U.S. 36 (2004), where the statements qualify as excited utterances under state law. Because the 27 State *amici curiae* have traditionally allowed the admission of excited utterances, the decisions here will substantially impact the admissibility of such statements in a wide variety of criminal cases, including those concerning domestic violence and crimes against children.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Confrontation Clause, as interpreted in *Crawford*, prohibits the admission of "testimonial" out-of-court statements by a declarant absent from trial, unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. 541 U.S. at 59. This rule is subject to two important limitations. First, *Crawford* does not govern nontestimonial hearsay. *Id.* at 68 ("[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law"). Second, *Crawford* does not govern hearsay, whether testimonial or not, of a type that was admissible at common law and thus incorporated into the Sixth Amendment. *Id.* at 56 n.6; see also *Mattox v. United States*, 156 U.S. 237, 243 (1895).

These cases concern the admission at trial of out-of-court statements found to qualify as excited utterances under state law. In *Hammon*, a police officer testified that he arrived at a reported domestic disturbance, where the declarant told him that her husband, petitioner Hammon, had just shoved her head into broken glass and twice punched her in the chest. Hammon

J.A. 82. The state appellate court held that the officer's testimony did not violate the Confrontation Clause, reasoning that the declarant's statement was an excited utterance and that excited utterances, by definition, are not testimonial under *Crawford*. *Id.* at 77 ("the very concept of an 'excited utterance' is such that it is difficult to perceive how such a statement could ever be 'testimonial'"). The state supreme court declined to adopt that *per se* rule, *id.* at 95, but held on other grounds — focusing upon the declarant's motivation in speaking to the officer, the officer's motivation in communicating with the declarant, and whether the officer's motivation rendered the communication a species of "police interrogation" whose fruits are subject to *Crawford*, see 541 U.S. at 53-54, 68 — that the statement was nontestimonial. Hammon J.A. 100-104.

In *Davis*, the victim called 911, hung up before saying anything, and then was called back by the 911 operator, who asked what was happening. Davis J.A. 117. The victim "was hysterical and crying as she responded, 'He's here jumpin' on me again,'" and identified petitioner Davis as her assailant. *Ibid.* The victim did not appear at trial, and the trial court, over Davis's objection, admitted a tape recording of the 911 call under the excited utterance doctrine. *Id.* at 118. The state appellate court affirmed, applying the then-applicable framework of *Ohio v. Roberts*, 448 U.S. 56 (1980). Davis J.A. 96-111. While the matter was on appeal to the state supreme court, *Crawford* was decided. *Id.* at 120. The state supreme court held that admitting the 911 tape did not violate *Crawford*. Noting that a California intermediate appellate court had held that "it is difficult to perceive any circumstances under which a statement qualifying as an excited utterance would be testimonial," *id.* at 125 (citing *People v. Corella*, 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770 (2004)), the state supreme court, like its counterpart in *Hammon*, did not adopt a *per se* rule in that regard. Rather, the court focused on the declarant's

motivation when speaking to the 911 operator in holding that her statement was not testimonial. Davis J.A. 125-128.

Both state supreme courts were correct to rule that the statements were properly admitted, and the grounds articulated by respondents Indiana and Washington amply support the judgments below. However, to conclude that the declarants' statements were proper under *Crawford*, this Court need not examine, let alone resolve, potentially difficult questions regarding the officer's and 911 operator's respective motivations in communicating with the declarants and whether their motivations rendered the communications "police interrogations" within the meaning of *Crawford*. Rather, for purposes of these cases, this Court need only hold that excited utterances are *per se* not governed by *Crawford*. See *United States v. Arnold*, 410 F.3d 895, 914-15 (6th Cir.) (Sutton, J., dissenting) (the number of excited utterances that are testimonial "may be something approaching a null set"), vacated and superseded on other grounds, ___ F.3d ___, 2005 WL 3315297 (6th Cir. Nov. 23, 2005).

Resolving these cases in that manner would comport with history, square with *Crawford*'s analysis and description of what it means for a statement to be "testimonial," and respect the States' development and implementation over the past two centuries of the excited utterance doctrine. With respect to history, because excited utterances were admissible at common law, see *White v. Illinois*, 502 U.S. 346, 356 n.8 (1992) (citing *Thompson v. Trevanion*, 90 Eng. Rep. 179 (K.B. 1694)), their admission is not prohibited by the Sixth Amendment. See *Mattox*, 156 U.S. at 243. The fact that cases decided in the decades after the Founding regularly admitted (what we now call) excited utterances, and that early nineteenth century treatises recognized excited utterances as an exception to the general rule against hearsay, indicates that such statements were not considered at the time to violate a defendant's constitutional

rights. And because the States have traditionally allowed excited utterances into evidence at criminal trials, subjecting such evidence to the rule set forth in *Crawford* would substantially disrupt long-settled practice.

The excited utterance doctrine has evolved since the Founding, but in a direction that confirms the conclusion that excited utterances are not governed by *Crawford*. At common law, statements now known as excited utterances were admissible as *res gestae*, on the ground that they were a natural continuation of some exciting event. In the modern era, excited utterances are understood to result from spontaneous reactions to stressful events, made without reflective thought or deliberation. A statement that qualifies as an excited utterance is necessarily and fundamentally incompatible with *Crawford*'s understanding of "testimony," which is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" 541 U.S. at 51 (quoting 1 N. Webster, *An American Dictionary of the English Language* (1828)); see *Arnold*, 410 U.S. at 914 (Sutton, J., dissenting) ("It is very difficult to imagine a 'solemn' excited utterance or even a semi-solemn excited utterance.").

ARGUMENT

EXCITED UTTERANCES ARE NOT GOVERNED BY *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004).

Excited utterances are not governed by *Crawford* for two separate reasons. First, because excited utterances were admissible as an exception to the hearsay rule at common law, the exception was incorporated into the Sixth Amendment; this means that excited utterances, as understood at common law, fall outside *Crawford*'s scope regardless of whether they are testimonial. Second, excited utterances, as understood in the modern era, are nontestimonial within the meaning of

Crawford, and thus fall outside of *Crawford*'s scope regardless of whether they would have been admissible at common law.

A. Excited Utterances Of The Kind Admissible At Common Law Are Not Governed By *Crawford*.

This Court looks to common law practice at the time of the Framing to ascertain the scope of the various provisions of the Bill of Rights. See, *e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-344 (2001); *Apprendi v. New Jersey*, 530 U.S. 466, 478-481 (2000); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358-371 (1995) (Thomas, J., concurring). The notion is that the Bill of Rights, absent a clear textual indication to the contrary, should not be interpreted to prohibit common law practices accepted at the Framing. See *Atwater*, 532 U.S. at 345 n.14 ("courts must be 'reluctant . . . to conclude that the Fourth Amendment proscribes a practice that was accepted at the time of adoption of the Bill of Rights . . . .'") (quoting *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting)); *Mattox*, 156 U.S. at 243 ("Many of [the Constitution's] provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected."); see also *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (same).

Consistent with this interpretive principle, *Crawford* held that "the 'right . . . to be confronted with the witnesses against him,' Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. at 54. It follows, the Court observed, that an exception to the Confrontation Clause's prohibition of testimonial hearsay might be drawn for hearsay admissible at the time of the Founding. *Id.* at 56 & n.6 (noting the existence of a hearsay exception for dying declarations at common law, and leaving unresolved

whether, given that exception, the Sixth Amendment "incorporates an exception for testimonial dying declarations"). In dicta, the Court suggested that the only such hearsay exception was for dying declarations. *Id.* at 56 n.6 ("If this exception [for dying declarations] must be accepted on historical grounds, it is *sui generis*.").

Two footnotes later, however, *Crawford* noted the possibility that the common law also recognized a hearsay exception for excited utterances. *Id.* at 58 n.8. (The Court used the term "spontaneous declarations," but that term is equivalent for present purposes to "excited utterances.") As demonstrated below, such an exception did exist at common law. For that reason, excited utterances of the type admissible at common law fall outside the prohibition set forth in *Crawford*, even assuming (incorrectly, see Section B, *infra*) that they are testimonial within the meaning of *Crawford*.

The excited utterance doctrine traces its provenance to *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1694), where Lord Chief Justice Holt held "that what the wife said immediate[ly] upon the hurt received, and before that she had time to devise or contrive any thing for her advantage, might be given into evidence" as "evidence of wounding." See 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, § 1746, at 2250 (1904) (hereniafter, "Wigmore (1904)") (citing *Thompson* as first case to recognize the doctrine); *Crawford*, 541 U.S. at 58 n.8; *White*, 502 U.S. at 356 n.8.

Although apparently not cited in any reported decisions before the Framing, *Thompson* appeared in cases and treatises shortly after the Founding. In *Aveson v. Kinnaird*, 6 East 188, 102 Eng. Rep. 1258 (1805), Lord Ellenborough, citing *Thompson* with approval, held that if a wife "declared at the time that she fled from immediate terror of personal violence from the husband," her out-of-court statement would be

admissible. *Id.* at 193-194, 102 Eng. Rep. at 1261; see also *Berkeley Peerage Case*, 4 Camp. 401, 408, 171 Eng. Rep. 128, 131 (1811) ("Hearsay evidence is always to be received with caution, and particularly that which may have arisen when men's minds were heated and biassed by an existing controversy upon the subject; but instead of laying down a rigid rule which may exclude *bona fide* declarations entitled to implicit credit, confide in the discretion of the Judge . . . .") (not citing *Thompson*).

Shortly thereafter, in "one of the most important evidence treatises of the nineteenth century," Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1211 (2002), the author favorably cited both *Thompson* and *Aveson* as exceptions to the general rule against admitting hearsay. 1 S.M. Phillipps, *A Treatise on the Law of Evidence* 202-203 (1st Am. ed. 1816). The same treatise cited *Rex v. Brasier*, 1 East Pl. Cr. 444 (1779), for the proposition that "on an indictment for a rape, what the girl said recently after the fact, (so that is excluded a possibility of practising on her), has been held to be admissible in evidence, as part of the transaction." Phillipps, at 202. Less than a decade later, another treatise cited *Thompson* in explaining that

> where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is admissible in evidence; as upon an indictment for rape, or upon an action for trespass and assault committed on the wife.

1 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 149 (1st ed. 1824) (also citing *Rex v. Clarke*, 2 Starkie 242 (1812), and *Brasier*). And while petitioner Davis cites Eustachius Strickland, *A Treatise on Evidence* 397 (1830), for

the proposition that "contemporaneous declarations 'respecting the motives or objects he had in view of doing' the act were admissible, but assertions 'made prior or subsequent to the doing the acts' were not," Davis Br. 24, the Strickland treatise, on the very same page, approvingly cites *Thompson* for the proposition that "what the wife had said immediately upon the hurt, and before she had time to devise or contrive anything for her own advantage, might be given in evidence."

In *Rex v. Foster*, 6 Car. & P. 325, 25 Eng. C.L.R. 421 (1834), where the defendant was tried for manslaughter for running over the victim with a cabriolet, a wagoner testified as to what the victim said shortly after the incident. The wagoner did not see the incident itself, but "immediately after on hearing the deceased groan, he went up to him and asked him what was the matter." *Ibid.* At that point, defense counsel objected, asserting "that what the deceased said in the absence of the prisoner, as to what had caused the accident, is not receivable in evidence." *Ibid.* In rejecting that argument, Justice Park, relying upon *Aveson*, admitted the testimony "to show what it was that had knocked the deceased down." *Ibid.* It bears mention that the reporter of the *Foster* case, in an annotation providing the precise citation to *Aveson* (6 East, 193), noted that *Aveson* had in turn relied upon Lord Chief Justice Holt's decision in *Thompson*. 6 Car. & P. at 325.

In *Commonwealth v. M'Pike*, 57 Mass. (3 Cush.) 181 (1849), another manslaughter case, the victim died three months after being stabbed by the defendant, her husband. Upon being stabbed, the victim ran from her apartment up the stairs to her neighbor's, knocked on the door, and was let in. *Id.* at 182. A third person, who had heard the victim scream, "went for a watchman," and returned to the neighbor's room, where the victim asked him for water and said that the defendant had stabbed her. *Ibid.* The trial court overruled the defendant's objection to the third person's testimony, and the Supreme

Judicial Court affirmed, reasoning that "[t]he declaration of a person, who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time, as to allow her to go from her own room up stairs into another room, is admissible in evidence." *Id.* at 181; accord, *Commonwealth v. Hackett*, 84 Mass. (2 Allen) 136, 138-140 (1861).

This Court relied upon several of the foregoing precedents in *Insurance Co. v. Mosley*, 75 U.S. (8 Wall.) 397 (1869). As evidence that the insured died from accidental causes, the insured's wife testified that the insured "got up [from bed] and went down stairs for the purpose of going out back," that "she didn't know how long he was gone," and that "[w]hen he came back he said he had fallen down the back stairs and almost killed himself." *Id.* at 399. In addition, the insured's son testified that "'he saw his father lying with his head on the counter, and asked him what was the matter; he replied that he had fallen down the back stairs and hurt himself very badly.'" *Id.* at 404.

The insurer argued that the declarant's statements should not have been admitted "as evidence of his fall down the stairs." *Id.* at 402-403. This Court disagreed, holding that the statements "were made immediately, or very soon after the fall; the declarations to his son, before he returned to his bed-room; those to his wife, upon his reaching there." *Id.* at 404. To support its ruling, this Court summarized the holdings of, and approvingly cited, *Thompson*, *Aveson*, *Foster*, and *M'Pike*. *Id.* at 405-407. In particular, the court explained that "[i]t is not easy to distinguish this case and that of [*Rex*] *v. Foster*, in principle, from the case before us, as regards the point under consideration." *Id.* at 407. In conclusion, and perhaps to eliminate any doubt as to the basis of its holding, the Court observed that the declarant's statements could not have been admitted as dying declarations. *Id.* at 409.

Despite the foregoing, petitioners assert that the common law did not recognize a hearsay exception for excited utterances. Hammon Br. 23 ("it is clear that as of 1791 there was no doctrine allowing admissibility of otherwise inadmissible statements on the ground that they were spontaneous declarations or excited utterances"); Davis Br. 18-22. To establish their point, petitioners must overcome *Thompson*, which was decided in 1694 and reported in 1728, see 6 W.S. Holdsworth, *A History of the English Law* 553 (1924), and thus available to the Framers. Their various attempts to do so are without merit.

1. Petitioners observe that *Thompson* was a civil case, not a criminal case. Hammon Br. 24; Davis Br. 29. That is true, but irrelevant. *Foster* and *M'Pike*, both criminal cases, relied upon *Thompson* (the former derivatively through *Aveson*), which indicates that courts understood *Thompson* to state a general evidentiary principle applicable to civil and criminal cases alike. The point is confirmed by Phillipps and Starkie, who in their early nineteenth century works cited *Thompson* in the same breath as criminal cases like *Brasier* and *Clarke*. See Phillipps, at 202-203; 1 Starkie, at 149. Further confirmation comes from this Court's opinion in *Mosley*, which cited civil (*Thompson* and *Aveson*) and criminal (*Foster* and *M'Pike*) cases for the same generally applicable evidentiary principle. *Crawford* itself cites *Thompson* as relevant authority. 541 U.S. at 58 n.8.

2. Hammon observes that *Thompson* was reported in 1728, but was not cited by another published decision until 1805. Hammon Br. 24. This, too, is true, but irrelevant. That *Thompson* was not cited by another *reported* decision until 1805 does not mean that the precedent was unknown or ignored in English and Colonial courts, the vast majority of whose decisions were unreported. *Thompson* itself was reported (Skin.

402), and it is sheer speculation for petitioner to suggest that it went unnoticed prior to the Founding.

3. Petitioners contend that *Thompson* was too vague and cryptic to stand for much of anything, let alone the principle that excited utterances are admissible as an exception to the hearsay rule. Hammon Br. 24-25; Davis Br. 30. Justice Clifford made a materially identical argument in his dissent in *Insurance Co. v. Mosley*, where he asserted that *Thompson* and *Foster* "are so imperfectly reported that they can hardly be said to be reliable." 75 (8 Wall.) at 418 (Clifford, J., dissenting). That argument failed to persuade this Court in *Mosley*, which had no trouble citing both decisions, and is no more persuasive 136 years later.

4. Petitioners contend that *Thompson* and its progeny govern only those circumstances where the out-of-court statement follows instantaneously from, or occurs simultaneously with, the exciting event. Hammon Br. 25-27; Davis Br. 30-31. Again, Justice Clifford unsuccessfully advanced the same argument in *Mosley*, see 75 U.S. (8 Wall.) at 412-413 (Clifford, J., dissenting). This Court rejected that proposition in citing *Thompson* to support the admission of an excited utterance made at least several minutes following the startling event. See *id.* at 399, 404; accord, *M'Pike*, 57 Mass. (3 Cush.) at 181-182 (same). *Thompson*'s and *M'Pike*'s application of the excited utterance doctrine in non-instantaneous circumstances is consistent with the views of Phillipps, who a generation after the Founding employed the term "recently," in addition to "immediate[ly]," in describing the appropriate interval between the exciting event and the (admissible) hearsay that followed. Phillipps, at 202-203.

5. Petitioners contend that two pre-Framing cases, *Rex v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202, 1 East Pl. Cr. 443 (K.B. 1779), and *Rex v. Radbourne*, 1 Leach 457 (1787), established a rule contrary to that set forth in *Thompson*, and

thus cast doubt upon whether *Thompson* reflected the law prior to the Framing. Hammon Br. 27-28; Davis Br. 20, 28. They are incorrect.

The defendant in *Brasier* was charged with assault upon a five year-old girl. 1 East Pl. Cr. at 443. The victim's mother and another woman testified that the victim, "immediately upon her coming home[,] told all the circumstances of the injury done to her, and described the prisoner, who was a soldier, as the person who had committed it." *Ibid.* After the defendant was convicted, the trial judge referred the matter "for the opinion of the judges." *Ibid.* Two of the judges (Gould and Willes) initially believed that the testimony was properly admitted, given their view that children under the age of seven could not be sworn. *Id.* at 444. The matter then was submitted to all of the judges, who (contrary to Gould's and Willes's initial view) "unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath; and consequently that evidence of what she had said ought not to have been received." *Ibid.* Significantly, the report concludes by noting that "[i]t does not however appear to have been denied by any in the above case, that the fact of the child's having complained of the injury recently after it was received is confirmatory evidence." *Ibid.*

Thus, at bottom, *Brasier* set forth a rule concerning whether a child is competent to testify at trial, not whether her out-of-court statement was inadmissible hearsay. That is precisely how the early state cases interpreted the decision. See *State v. Whittier*, 21 Me. 341, 1842 WL 1198, *5 (1842); *State v. Morea*, 2 Ala. 275, 1841 WL 201, *3 (1841); *State v. Miller*, 1 Del. Case 512 (1814); see also 1 John E. B. Myers, *Evidence in Child Abuse and Neglect Cases* § 2.2, at 67 (1992) (citing *Brasier* as the first case to create a presumption of competency for child witnesses); Comment, *Li'l People, Little Justice: The Effect of the Witness Competency Standard in California on*

Children in Sexual Abuse Cases, 22 J. Juv. L. 113, 114 (2001-2002) (citing *Brasier* as a competency case). Equally significant, Phillipps and Starkie — in marked contrast to petitioners — interpreted *Brasier* as reflecting, rather than refuting, the principle earlier set forth in *Thompson*. See Phillipps, at 202 (citing *Brasier* for the proposition that "on an indictment for a rape, what the girl said recently after the fact, (so that is excluded a possibility of practising on her), has been held to be admissible in evidence, as part of the transaction"); 1 Starkie, at 161 (citing *Brasier* for the proposition that "where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is admissible in evidence; as upon an indictment for rape"). If *Brasier* meant what petitioners claim it means, then Phillipps and Starkie, both writing in the early nineteenth century, would not have read it the way they did.

Even putting aside what *Brasier* meant, those who drafted the Confrontation Clause would not have been aware of, and so could not have been influenced by, the case. *Brasier* is cited in three reporters. Volume 168 of the English Reports was not published until 1928. Volume 1 of East's Pleas of the Crown was not published until 1803. The first volume of Thomas Leach's Crown Cases was not published until May 1789, in London, "at the earliest." Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 Brook. L. Rev. 105, 157 n.163 (2005).

Although May 1789 predated the Framing, Leach's volume was not published in time to have actually influenced the Framers. The First Congress approved the Bill of Rights for state ratification in September 1789. *Id.* at 159. However,

"[t]he legislative record shows that there was no alteration of the [Confrontation Clause's] text following the report of the committee of eleven on July 11, 1789, and the only change that committee made from the proposals Madison had offered on June 8 [was] the deletion of the redundant words 'accusers and' . . . ." *Ibid.* Given this, Leach's first volume likely did not reach our shores by the time the Clause was framed. *Id.* at 160 ("taking into account the time to ship (literally) that volume to America and distribute it to customers, it is questionable whether copies . . . were available to Americans at all when the Confrontation Clause was framed "); cf. *White*, 502 U.S. at 363 (Thomas, J., concurring) (in ascertaining the meaning of the Confrontation Clause, looking to what "the drafters of the Sixth Amendment intended").

Davis cites the other pre-Framing case, *Rex v. Radbourne*, as evidence that English courts at the time of the Framing refused to admit testimony of "accusations" made to police "fresh[ly]" after the crime. Davis Br. 20. But because *Radbourne*, like *Brasier*, was first published in Leach, it could not have come to the attention of the Framers before the Framing. In any event, *Radbourne* did not appear to involve an excited utterance and says nothing to suggest that one would have been inadmissible.

The victim in *Radbourne* was lying in her bed, her wounds already bandaged, when she made the inadmissible statements, and there is nothing in the transcript of proceedings to indicate that she was agitated when she spoke. The Proceedings of the Old Bailey, London 1674 to 1834, Henrietta Radbourne, t17870711-1, at 11-12 (July 11, 1787), <http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html> (last visited Jan. 12, 2006) (testimony that victim was in bed and that constable could not observe her wounds because they were "done up" before he arrived) (using citation convention described in Davis Br. 19 n.4). Moreover, because

the defendant was a servant accused of killing her mistress, she was charged with both murder and petty treason. *Id.* at 20. "Thus, evidence in the trial was subject to the explicit requirement in the treason statutes," not applicable under the Marian statutes, "that all evidence of treason be taken 'in the presence' of the accused." Davies, 71 Brook. L. Rev. at 165. Given this, it is no surprise that nineteenth century American cases that cited *Radbourne* did not do so for the proposition advanced here by Davis. See, *e.g.*, *Mattox*, 156 U.S. at 240 (for the proposition that "the testimony of a deceased witness cannot be used in a criminal prosecution"); *Hart v. State*, 15 Tex. App. 202, 1883 WL 8889, *15 (1883) (for the proposition that "[i]n England, testimony before the examining magistrate on a charge of felonious wounding was deemed admissible on the trial for murder, where the injured person had died of the wound").

Davis also cites *State v. Hill*, 20 S.C.L. 607, 1835 WL 1416, *2 (App. L. 1835), as establishing that "[d]eclarants' 'excitement' . . . in no way exempted their statements reporting crimes to governmental agents from confrontation restrictions." Davis Br. 22. "If anything," Davis contends, "such excitement was seen as heightening the need for cross-examination," quoting the court's reference to excitement's potential to "'color[]'" testimony. *Ibid.* In fact, the declaration in *Hill* took the form of a "deposition . . . made on the application for" an arrest warrant in formal proceedings before a magistrate. 1835 WL 1416, at *1. That is precisely the sort of "formal statement to government officers" governed by the Confrontation Clause. *Crawford*, 541 U.S. at 51. Moreover, the "excitement incident to the wrong done" to which *Hill* referred as a possible source of bias is not the agitation that accompanies an excited utterance. Rather, as context makes clear, the court referred to the emotion that the crime victim may feel long after the incident, expressing concern that the declarant's status as a victim may "color[]" his formal testimony before a magistrate. *Ibid.*

Davis further cites *Rex v. Wink*, 6 Car. & P. 397, 172 Eng. Rep. 1293 (1834), for the proposition that a constable could not be asked at trial to repeat a robbery victim's identification of the assailant when reporting the crime. Davis Br. 20. Davis buries *Wink* in a parenthetical, and for good reason. While holding that the constable could not *directly* testify as to the name told him by the victim, the court proceeded to rule that the constable could testify as to "whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person and, if he did, who that person was," 6 Car. & P. at 398, 172 Eng. Rep. at 293 — which of course was functionally equivalent to allowing the constable to repeat the name the victim had given.

6. Finally, Davis relies on treatises and cases from after 1870 to support his view that excited utterances were inadmissible in criminal trials. Davis Br. 24-27. Even assuming that materials of that vintage are relevant here, the weight of case authority from that era took the view that excited utterances were admissible. See, *e.g.*, *People v. Del Vermo*, 192 N.Y. 470, 483-487, 85 N.E. 690, 695-696 (1908) (noting that exception was accepted in the majority of States); *State v. Morrison*, 64 Kan. 669, 68 P. 48, 51 (1902); *Croomes v. State*, 40 Tex. Crim. 672, 676-677, 51 S.W. 924, 925 (1899); *State v. Murphy*, 16 R.I. 528, 17 A. 998 (1889); *Dismukes v. State*, 83 Ala. 287, 3 So. 671, 673 (1888); *Irby v. State*, 25 Tex. App. 203, 213-214, 7 S.W. 705, 706 (1888); *People v. Callaghan*, 4 Utah 49, 6 P. 49, 54-55 (1886); *State v. Horan*, 32 Minn. 394, 20 N.W. 905 (1884); *Kirby v. Commonwealth*, 77 Va. 681, 1883 WL 6701, *5 (1883); *State v. Middleham*, 17 N.W. 446, 446 (Iowa 1883); *State v. Wagner*, 61 Me. 178, 1873 WL 3285, *10-*11 (1873); *Crookham v. State*, 5 W.Va. 510, 1871 WL 2786, at *3 (1871).

The weight of authority is even greater today. See *White*, 502 U.S. at 356 n.8 (excited utterance doctrine recognized under Fed. R. Evid. 803(2) and nearly four-fifths of the States).

This consensus, particularly given the long-standing vitality of the excited utterance exception and the "respect traditionally accorded the States in the establishment and implementation of their own criminal trial rules and procedures," *Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973), should not lightly be disturbed.

* * *

In sum, the hearsay exception for excited utterances, conceived in *Thompson*, existed at common law. Court decisions and treatises from the decades after the Framing, while of course unavailable to the Framers, provide persuasive evidence that the Framers' generation recognized the exception. See *Crawford*, 541 U.S. at 49-50 (citing cases through 1858 and treatises through 1872); cf. *Atwater*, 532 U.S. at 337-344; *Apprendi*, 530 U.S. at 501-512 (Thomas, J., concurring); *Utah v. Evans*, 536 U.S. 452, 503-506 (2002) (Thomas, J., concurring and dissenting); *Alden v. Maine*, 527 U.S. 706, 743-745 (1999); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801-804, 816-819, 823-827 (1995). For this reason, the Confrontation Clause does not govern excited utterances of the type admissible at common law.

B. Excited Utterances, As Understood In The Modern Era, Are *Per Se* Nontestimonial And Thus Not Governed By *Crawford*.

In the early nineteenth century, the excited utterance doctrine was understood to be a subset of the *res gestae* doctrine. 2 McCormick on Evidence §268, at 195-196 (5th ed. 1999). The notion underlying *res gestae* was that certain types of hearsay statements were admissible because they were inextricably linked to action. "The *res gestae* doctrine focused not on the reflective faculties of the declarant, but on the strict contemporaneousness of the statement with the exciting event, so that the statement was essentially a continuation of the

event." Jone Tran, *Crying Wolf or an Excited Utterance? Allowing Reexcited Statements to Qualify Under the Excited Utterance Exception*, 52 Clev. St. L. Rev. 527, 541-42 (2004-05).

Shortly after the turn of the last century, Wigmore expressed a different understanding, explaining that "the basis for the spontaneous exclamation exception [was] not the contemporaneousness of the exclamation, but rather the nervous excitement produced by the exposure of the declarant to an exciting event." 2 McCormick, § 271, at 200. As Wigmore wrote: "The general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock." 3 Wigmore (1904), §1747, at 2250. "The rationale for the exception lies in the special reliability that is furnished when excitement suspends the declarant's powers of reflection and fabrication." 2 McCormick, § 272, at 204.

Wigmore's recasting of the doctrine took hold and remains the prevailing rationale for the modern excited utterance doctrine. See Tran, 52 Clev. St. L. Rev. at 542 ("Wigmore's endorsement of deliberation over spontaneity ultimately superceded the *res gestae* doctrine as the lynchpin to the excited utterance exception."). Currently,

> all agree on two basic requirements. First, there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer. Second, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. These two elements, which define the essence

> of the exception, together with a third requirement that the statement 'relate to' the event, . . . determine admissibility.

2 McCormick, §272, at 204. Although today's rationale for the doctrine differs from that prevailing at common law, the actual contours of the exception have changed little:

> Its phrasings differ widely in different courts; but there is in the judicial opinion of today something of an approach to uniformity. In essence, the language of Lord Holt, in *Thompson v. Trevanion*, still serves to indicate clearly and concisely the principle of the exception.

6 Wigmore, *Evidence* § 1747, at 196 (Chadbourn rev. 1976).

In their modern form, excited utterances are fundamentally incompatible with the conception of a "testimonial" declaration under *Crawford*. This emphatically is *not* because excited utterances are reliable or trustworthy. See *Crawford*, 541 U.S. at 60-65 (rejecting reliability and trustworthiness as the touchstone of Confrontation Clause analysis). Rather, it is because the agitated, unthinking state that makes an excited utterance reliable for hearsay purposes *also* makes it nontestimonial for Confrontation Clause purposes. Although *Crawford* "broke the linkage" between the Confrontation Clause and the "inquiry whether the testimony was eligible for admission under an accepted hearsay exception," the qualities that make a hearsay statement an excited utterance may still "bear on whether a statement is testimonial or not." *Arnold*, 410 F.3d at 912 (Sutton, J., dissenting).

The Confrontation Clause "applies to 'witnesses' against the accused — in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51 (citation omitted). A statement is testimonial if it is a "solemn declaration or affirmation made for

the purpose of establishing or proving some fact." *Ibid.* (internal quotations omitted). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Ibid.* "The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." *Ibid.*

The agitated declarant who makes an excited utterance is far afield from the formal accusers and solemn witnesses that concern the Confrontation Clause. Declarants in a state of "physical shock [or the] stress of nervous excitement," whose "reflective faculties" have been stilled, 3 Wigmore (1904) §1747, at 2250, are incapable of rendering solemn or formal statements. As Judge Sutton observed,

> It is very difficult to imagine a 'solemn' excited utterance or even a semi-solemn excited utterance. Any statement that takes on the qualities that the Court has ascribed to the definition of testimonial evidence (a 'solemn declaration . . . ' *Crawford*, 541 U.S. at 51) or to agreed-upon forms of testimonial evidence ('affidavits, depositions, prior testimony, or confessions,' *id.* at 51-52) would seem to depart from the prerequisites for establishing an excited utterance. To respect the one set of requirements would seem to disrespect the other.

Arnold, 410 F.3d at 914 (Sutton, J., dissenting); see also *id.* at 912 (Sutton, J., dissenting) ("Surely a victim's fear-induced statement to a 911 dispatcher that he is being chased through the house by an assailant is nothing more than a fervent cry for help, not a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact' in a court of law.") (quoting *Crawford*, 541 U.S. at 51).

Both state supreme courts below examined the declarant's perspective in determining whether her statement was testimonial. Hammon J.A. 100-104; Davis J.A. 125-128. In challenging the courts' judgments, petitioners agree that analysis under *Crawford* should focus on the declarant's perspective. Hammon Br. 7, 14, 17-20; Davis Br. 13, 41-42; see also ACLU Br. 16 ("The testimonial nature of the statement should be tested by reference to how a reasonable person would expect the statement to be used."). For himself, Hammon contends that the inquiry should be whether the declarant "*knowingly created evidence* that a reasonable person understands will likely be used by the criminal justice system," and argues that "[t]he jurisprudence of the Confrontation Clause should recognize that such *self-conscious creation of evidence* is testimonial . . . ." Hammon Br. 18 (emphasis added).

Petitioners' approach is open to serious question for the reasons ably advanced by respondents Indiana and Washington. The point here is not to enter the debate, but merely to observe that petitioners' view, if adopted by this Court, would serve only to *strengthen* the proposition that excited utterances are *per se* nontestimonial. A declarant under the stress of nervous excitement, such that her normal reflective processes are rendered inoperative, is in no position to "self-conscious[ly]" do anything, let alone "creat[e] . . . evidence" that she "understands" will likely be used in a future prosecution. The reason is plain: "When the declarant's emotional state is such that it would satisfy the spontaneous utterance exception, the declarant does not (and reasonably would not) entertain any expectations about whether his or her statement will be used at a possible future trial — the whole premise of spontaneous utterances is that the witness is not capable of such reasoning at the time he or she is speaking." *Commonwealth v. Gonsalves*, 445 Mass. 1, 34, 833 N.E.2d 549, 572 (2005) (Sosman, J., concurring in part); accord, *State v. Ohlson*, 125 P.3d 990, 995 (Wash. App. 2005) ("It is not reasonable to regard an excited

utterance as 'bearing witness' such that the declarant would know that it would be used in a later prosecution.").

In sum, excited utterances, as understood under modern doctrine, are *per se* nontestimonial. For that reason — and regardless of whether (and, if so, to what extent) excited utterances were recognized as a hearsay exception prior to the Framing — they are exempt from scrutiny under *Crawford*. See 541 U.S. at 68 ("[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law").

CONCLUSION

The judgments of the Indiana Supreme Court and the Supreme Court of Washington should be affirmed.

Respectfully submitted.

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